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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 774

PHILIP CHARLES TESTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original *per curiam* opinion of the court of appeals (Pet. App. A1; R. 37-38) and the *per curiam* opinion denying the petition for rehearing (Pet. App. A2-13; R. 85-96) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1963 (Pet. App. B14; R. 39). A peti-

tion for rehearing was denied on January 14, 1964 (Pet. App. B15; R. 97). The petition for a writ of certiorari was filed on January 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury proceedings were, in the words of the immunity provision of the Federal Communications Act, "based upon or growing out of any alleged violation of this Act," so that the district court was empowered to grant immunity to petitioner and compel his testimony.

2. Whether the grand jury's subsequent return of an indictment against petitioner vitiates the prior determination that petitioner was in contempt for refusing to testify pursuant to a tender of immunity, or whether it relieves petitioner of the continuing obligation to testify upon assurance of immunity.

3. Whether the immunity provision of the Communications Act grants immunity from State as well as federal prosecution.

4. Whether in the circumstances the procedures followed by the district court in adjudging petitioner in contempt were proper.

STATUTE AND RULE INVOLVED

Section 409 of the Communications Act of 1934, 48 Stat. 1096, as amended, 66 Stat. 721, 47 U.S.C. 409, provides in pertinent part:

> (l) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the [Federal Communications] Commission, or in obedience to the subpena of the Commission, * * * or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * * except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Third Circuit affirming the

adjudication of the United States District Court for the Eastern District of Pennsylvania holding petitioner in contempt for refusing to answer certain questions put to him as a witness before a grand jury.

On October 25, 1963, petitioner appeared before the grand jury under subpoena. Claiming his privilege against self-incrimination, he refused to answer any of the questions put to him other than the request for his name and address. As a result, he was brought before the district court (R. 2). After a recess during which petitioner was afforded the opportunity to consult with counsel (R. 7), the court, with members of the grand jury present, directed petitioner to answer preliminary questions which defense counsel agreed would not incriminate the witness (R. 12-14). Petitioner then returned before the grand jury and answered these inquiries. However, after consultation with counsel, he claimed his privilege as to further questions asked him (R. 14-15, 16-17). He was then informed by government counsel that the grand jury was investigating possible violations of 18 U.S.C. 1952 and 47 U.S.C. 501 [1] and that, under the latter

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[1] More particularly, petitioner was told that the grand jury was inquiring into "possible violations of the law of the United States which prohibits travel or the use of any facility, such as telephone in connection with any extortion in violation of the laws of the State of Pennsylvania and New Jersey, * * * [and] it to any possible conspiracy to violate that law; [18 U.S.C. 1952] and also any violations or conspiracies to violate Title 47 of the United States Code, Section 501, which is part of the Federal Communications Act which makes it an offense to use any telephone, facility—any telephone—for an unlawful or illegal purpose." (R. 17-18).

statute, he would have immunity from prosecution "for any testimony that [he] may give" before the grand jury (R. 18-19). When petitioner stated that he was not sure he understood the remarks of government counsel, he and the Assistant United States Attorney stepped out of the grand jury room and conferred with petitioner's counsel (R. 19). When petitioner returned, he persisted in his claim of privilege, refusing to answer any questions (R. 19-24), even with respect to whether he had just previously conferred with his attorney (R. 19-20). He refused, *inter alia*, to answer whether he had a summer residence in Ventnor or Atlantic City, New Jersey; whether he had ever gone to such residence between May 1963 and the date (October 25, 1963) of the grand jury inquiry; whether he had a telephone at that address; whether that telephone number was 822-4840; whether he used that telephone on or about September 7, 1963 to call a "Howard number" in Philadelphia, Pennsylvania; what the purpose of that call was and what he said; whether his telephone number at his home in Philadelphia was Dewey 4-0895; and whether he had made calls, and to whom, from his home telephone to Penns Grove and Salem, New Jersey on September 5 and 11, 1963 (R. 20-23). The foreman of the grand jury directed petitioner to answer these questions but petitioner persisted in his refusal on the ground of the privilege against self-incrimination (R. 20, 24).

Petitioner was then brought again before the district court, with the members of the grand jury

present (R. 14). The government requested that the court direct petitioner to answer the questions "since quite obviously these questions relate to possible violations of 47 United States Code, Section 501, based on the requirements for immunization of witnesses pursuant to Title 47 U.S.C., Section 409(l) * * *" (R. 24). The court then advised petitioner (R. 24-25):

> Mr. Testa, you are completely immune from prosecution for anything concerning which you testified to before this Grand Jury, and I therefore direct you to answer the questions of the United States Attorney.

At this juncture, petitioner's counsel responded that petitioner had advised him that "rather than sending him back upstairs again and coming back down, that he does not intend to answer the questions" (R. 25). The court then specifically asked petitioner whether it was his intention to refuse to answer the questions of the United States Attorney. Petitioner answered that he "refuse[d] to answer any more questions" (*ibid*). At this point, the court held the witness in contempt, to be committed to the custody of the Attorney General without bail "until such time as he purges himself of this contempt". (R. 25, 27).

On appeal, the court of appeals (Staley, Hastie and Smith, JJ), in a *per curiam* opinion, sustained the contempt adjudication on the authority of its ruling in *Marcus* v. *United States*, 310 F. 2d 143, certiorari denied, 372 U.S. 944 (R. 37-38; Pet. App. A1). In *Marcus*, the court had held that where a grand jury proceeding was based upon, or grew out of any violation of, the Federal Communications Act, the immuni-

ty provisions of that Act applied even though the grand jury was investigating violations of other statutes as well. A petition for rehearing *en banc* (R. 40-47) was denied, *per curiam*, Chief Judge Biggs and Judge Kalodner dissenting (R. 85-96; Pet. App. A2-13).

2. While the case was pending on appeal, the grand jury, on November 1, 1963, returned an eight-count indictment against petitioner and eight others charging violations of 18 U.S.C. 1952 by travel in interstate commerce and the use of an interstate facility (a telephone) for the purpose of extortion (counts 2-7) and conspiracy to violate that section (count 1) (R. 66-77). One of the codefendants was charged with a violation of Sections 203 (c)(3) and 501 of Title 47 by causing the telephone company to extend to him facilities for telephonic communication which were not specified in the tariff filed by the company (R. 77). All the charges against this particular defendant were dismissed under the immunity conferred by 47 U.S.C. 409(l) after he testified before the grand jury, as he had previously refused to do.

In its opinion affirming the adjudication of contempt, the court stated that its affirmance was "without prejudice to the right of the appellant to apply to the district court for such relief as may be necessary and proper in the light of any events which have occurred since the imposition of sentence" (R. 38; Pet. App. A1).

On the day of this opinion, November 8, 1963, and without waiting for the mandate, petitioner applied to the district court for such relief as that court might

deem proper. The district court declined to grant any relief, stating that it had sent petitioner to jail until he should purge himself of contempt and that petitioner had not so purged himself. The court was of the view that the indictment did not affect petitioner's duty to testify before the grand jury since, as soon as he testified, he would have immunity (R. 48-53). The district judge stated, in this connection, that the United States Attorney would move for, and he would approve, dismissal of the indictment if petitioner testified before the grand jury (R. 52).[2] This action was brought to the attention of the court of appeals before it denied the petition for rehearing *en banc*.

ARGUMENT

1. As the court of appeals ruled, the proposition that petitioner had no right to persist in his claim of the privilege against self-incrimination in the face of an assurance of immunity from prosecution was established by its prior ruling in *Marcus* v. *United States*, 310 F. 2d 143, certiorari denied, 372 U.S. 944. As in *Marcus*, so here, the subject matter of the grand jury inquiry met the statutory condition upon which the application of the immunity provisions depends;

[2] Without proceeding further in the district court with respect to this November 8 application for discharge from contempt, petitioner filed a notice of appeal from the district court's adverse ruling. On November 18, 1963, the court of appeals dismissed this later appeal ruling that, since the cause had not yet been remanded to the district court on November 8, there was nothing upon which the district court could act, and consequently no order which would support an appeal (R. 58-59, 79, 86, n. 1).

the grand jury was conducting an investigation "based upon or growing out" of alleged violations of the Federal Communications Act. The prosecuting attorney repeatedly declared to the court and to petitioner that the scope of the grand jury inquiry included "possible violations" of the Federal Communications Act (R. 18-19, 24). The questions asked of petitioner (see Statement, *supra*, p. 5) themselves revealed that the grand jury was investigating the interstate use of the telephone. Although the purpose of the calls does not appear from the content of the questions themselves, it was apparent that the government wished to determine whether the telephones had been used for an illegal purpose. Such use would presumptively violate Section 501 of Title 47.[3] That an investigation of possible violations of other statutes was also within the purview of the grand jury inquiry does not, as *Marcus* makes clear, render the immunity provision inapplicable. So long as there was a nexus between the subject matter of the inquiry and a possible violation of the Communications Act, it was proper to utilize the immunity provision of the Communications Act. See *United States* v. *Onassis*, 125

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[3] Under Section 501 (48 Stat. 1100, as amended, 68 Stat. 30); "[a] person who willfully and knowingly * * * causes or suffers to be done any act, matter, or thing * * * prohibited or declared to be unlawful * * *" in the Communications Act commits an offense punishable by fine and imprisonment. In turn, Section 203 (c) of the Act (48 Stat. 1070), provides that no carrier shall provide communication service "except as specified" in its tariff. Such tariffs provide that the service is furnished subject to the condition that it will not be used for an unlawful purpose.

F. Supp. 190, 199-200 (D.D.C.) and *United States v. Niarchos*, 125 F. Supp. 214, 224 (D.D.C.) where, in overruling a government claim that the witnesses had not obtained immunity by testifying before a grand jury because the subject matter of the grand jury inquiry was not related to Shipping Act violations, the court ruled that the immunity provision of the Shipping Act (46 U.S.C. 827) did apply since "the subject matter of the inquiry related to *possible* violations of Sections 9 and 41 [of the Shipping Act]" (125 F. Supp. at 200, 224), even though the government argued that it was concerned in the inquiry only with violations of other statutes (125 F. Supp. at 200, 224).

We point out additionally that, although petitioner was represented by counsel, he never urged in the district court that the subject matter of the grand jury inquiry was not related to possible violations of the Communications Act. It is therefore too late for him to argue that the relevancy of the questions to a violation of the Communications Act was not sufficiently shown. It was not essential, as suggested by Judge Kalodner in dissent (Pet. App. A5-6), that the content of questions asked of petitioner establish on their face that the investigation concerned a violation of the Federal Communications Act. While the nature of the questions might be strong evidence of the scope of the inquiry, they were not the sole means of ascertaining the grand jury's purpose. The statute does not make the nature of the questions dispositive. Rather it grants immunity in exchange for testimony adduced in a "proceeding * * * based upon or grow-

ing out of" any alleged violation of the Act. If petitioner had wished to contest the applicability of the immunity statute, he should have raised that issue in the district court.[4]

2. That an indictment was subsequently returned against petitioner does not, we submit, impinge upon the validity of the contempt commitment or the propriety of the remedy employed by the district court. The grand jury is still in session and there is reason to believe that petitioner can provide testimony on matters related to, but not covered by, the present indictment. The result of giving such testimony would be that petitioner would be immunized from prosecution under the present indictment—as was a codefendant, similarly situated, who ultimately purged himself of contempt by testifying before the grand jury. The immunity flowing from such testimony would, in short, bar prosecution under the instant indictment. See, *e.g.*, *Smith* v. *United States*, 337 U.S. 137, 148-149, 153; *Edwards* v. *United States*, 312 U.S. 473, 479-480; *United States* v. *Andolschek*, 142 F. 2d 503, 505-506 (C.A. 2).

In this case, both the United States Attorney and the district court explicitly informed petitioner that the indictment would be dismissed upon his answer-

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[4] The situation of *In re Bart*, 304 F. 2d 631 (C.A.D.C.) is inapposite. Under the statute there involved (the Immunity Act of 1954, 18 U.S.C. 3486) the court has to make a finding that the offense under investigation involves "interference with or endangering of the national security or defense." The opinion in *Bart* points out that since the court has to make the judgment "he obviously cannot decide except on the basis of facts presented" 304 F. 2d at 636.

ing the questions of the grand jury.[5] (See R. 50, 52). There is no reason why the coercive sanction of commitment should not continue to compel petitioner to give testimony which is relevant to the grand jury's investigation and which, by law, he had and has no right to withhold. We recognize that two Justices of this Court, dissenting in *Piemonte* v. *United States*, 367 U.S. 556, 565 (dissenting opinion of Mr. Justice Douglas joined in by Mr. Justice Black), expressed the opinion that once an indictment had been returned,[6] there is no power to compel testimony under a grant of immunity. This, however, was not the view adopted by the Court. We also stress that the immunity statute involved here provides that no individual "shall be prosecuted or subjected to any penalty or forfeiture" if he testifies after a claim of privilege. The statute thus contemplates that the immunity resulting from the testimony may attach after, as well as before, indictment. See *In re Kittle*, 180 Fed. 946 (S.D. N.Y.) in which Judge Learned Hand so ruled. Accordingly, petitioner can secure

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[5] The fact that the indictment returned against petitioner charged a violation of 18 U.S.C. 1952 and conspiracy to violate that section rather than a violation of the Federal Communications Act would not affect his immunity from prosecution were he to testify before the grand jury. As this Court stated in *Brown* v. *United States*, 359 U.S. 41, 47, in construing the immunity provisions of the Motor Carrier Act, 49 U.S.C. 305(d), the limitation of the immunity provision affects "only the class of witnesses to whom the immunity will attach, not the scope of the immunity conferred."

[6] Contrary to petitioner's suggestion (Pet. 9), the prior conviction of *Piemonte* had no bearing on this issue.

both release from custody and dismissal of the indictment by answering the questions of the grand jury (which is still in session).

3. It was also settled by the Third Circuit's recent decision in *Marcus, supra*, that 47 U.S.C. 409(l) confers immunity from State as well as federal prosecution. Petitioner's argument to the contrary (Pet. 9-11), made also by Judge Kalodner in dissent (Pet. App. A9-11), stems from the different wording of the statute involved in *Reina* v. *United States*, 364 U.S. 507, *Piemonte* v. *United States*, 367 U.S. 556, *Ullmann* v. *United States*, 350 U.S. 422, and *Adams* v. *Maryland*, 347 U.S. 179.[7] In these cases, the argument runs, this Court found State prosecutions were barred because the immunity statutes involved made it explicit that the compelled testimony could not be used as evidence in "any criminal proceeding * * * in any court"—whereas 47 U.S.C. 409(l) does not contain express language of prohibition. This argument ignores, however, the much earlier decision of this Court in *Brown* v. *Walker*, 161 U.S. 591, 607-608, dealing with the immunity provisions of the Act of February 11, 1893, 27 Stat. 443, 49 U.S.C. 46, upon which the statute here in issue was modeled.[8] In *Brown*, the Court said:

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[7] *Reina* and *Piemonte* involved the immunity provisions of the Narcotic Control Act of 1956, 18 U.S.C. 1406. *Ullmann* involved the Immunity Act of 1954, 18 U.S.C. 3486 and *Adams* the predecessor Immunity Act of 1948, 62 Stat. 833.

[8] See *Ullmann* v. *United States*, 350 U.S. 422, 438, where this Court observed: "The 1893 statute has become part of our constitutional fabric and has been included in sub-

> The act in question contains no suggestion that it is to be applied only to the Federal courts. It declares broadly that "no person shall be excused from attending and testifying * * * before the Interstate Commerce Commission * * * on the ground * * * that the testimony * * * required of him may tend to criminate him," etc. "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had. [Emphasis in the original.]

See *Ullmann* v. *United States*, 350 U.S. 422, 436; *Reina* v. *United States*, 364 U.S. 507, 511. In short, here no less than in *Ullman*, *Reina*, *Piemonte* and *Adams*, protection against prosecution is comprehensive. There is therefore no occasion to reexamine the ruling in *United States* v. *Murdock*, 284 U.S. 141, that the self-incrimination clause of the Fifth Amendment does not protect a federal witness from answering

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stantially the same terms, in virtually all of the major regulatory enactments of the Federal Government' ".

questions which might incriminate him under State law.

4. Finally, there is no basis for petitioner's complaints (Pet. 12-14) as to the procedures followed in the instant case. The only reason that the procedure was short was that petitioner made it so. It was he who, after the judge had directed him to answer, informed the judge, through counsel, that there was no point in going before the grand jury again since he had made up his mind not to answer any questions. It is evident that both petitioner and his counsel were not confused about the meaning of the judge's direction that he answer the questions. Neither petitioner nor his counsel indicated in any way that they wished to contest the court's ruling that petitioner did have immunity under the statute; neither petitioner nor his counsel indicated that they wished to offer any explanation or reason for his refusal to answer. Since petitioner, with his counsel and the grand jury present, flatly posed the basic issue—that he was not going to obey the court's order—the court was obviously correct in dealing with the case for what it was—a deliberate contempt in the presence of the court. See *Brown* v. *United States*, 359 U.S. 41, 47-52.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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